In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 432

JOHN V. HOLMES, ET AL., PETITIONERS

v.

JAY EDDY, SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS (OTHER THAN EDDY AND HARRIS, UPHAM & COMPANY) IN OPPOSITION

On December 12, 1961 the Securities and Exchange Commission instituted an action in the United States District Court for the Western District of Oklahoma to enjoin the petitioners and others from selling unregistered stock and from using false and misleading sales literature, in violation of the federal securities laws. After a trial, the district court entered a permanent injunction. *Securities and Exchange Commis-*

sion v. *Bond and Share Corporation*, 229 F. Supp. 88 (W.D. Okla.), pending on appeal, C.A. 10, No. 7797.

Subsequent to the institution of the Commission's action, the petitioners filed two suits based on the Commission proceedings, in which they sought damages and injunctive relief. The first suit (*Holmes* v. *Eddy*), brought against the Commission, its former chairman, several Commission employees and respondent Eddy and his employer, Harris, Upham & Company (a broker-dealer), charged that the respondents had conspired to and did publicly circulate false statements about the petitioners which constituted an "attractive public nuisance" to their damage (Pet. 3a). Petitioner's principal complaint was that the Commission had attached to its complaint an affidavit by Eddy to which was attached a stock solicitation letter he had received through the mail from petitioner Hydramotive Corporation, on which he had written that "This company looks like an attempt to bilk the public via the securities market—it has a smell similar to all such" (Pet. App. 1a-2a). The affidavit was used in the Commission suit solely to show that petitioners had used the mails in offering securities (Pet. App. 2a). The second suit (*Holmes* v. *United States*), filed against the United States, the Commission, its present and former chairmen and numerous Commission employees, alleged that the respondents had unlawfully disclosed certain confidential design drawings of an automobile and tire that the petitioners were developing and promoting, which design the Commission had obtained during its investigation of petitioners (Pet. App. 3a-4a, 7a).

The Commission introduced the design drawings into evidence in its suit without objection (Pet. App. 7a).

In both cases, the district court granted the defendants' motions for summary judgment (Pet. App. 3a, 4a). The court of appeals affirmed in a single opinion disposing of both cases. It held in *Holmes* v. *Eddy* that, insofar as the government defendants were concerned (Pet. App. 4a),

> A careful study of the entire record on appeal reveals nothing that was done by the defendants, except Jay Eddy and Harris, Upham & Company, other than acts wholly within the scope and course of carrying out their official duties as authorized by 15 U.S.C. 77t and 78u in carrying out the investigation of plaintiffs' business. The allegations of plaintiffs' complaint, together with other pertinent portions of the record, bring the plaintiffs' action clearly within the established principle of law that "public officers when acting within the scope of their official authority are immune from suit for damages."

In *Holmes* v. *United States* it ruled (Pet. App. 8a) that "the acts of the defendants of which the plaintiffs complain consisted wholly of acts done within the scope and course of carrying out official duties in investigating the plaintiffs' business practices and activities."

The decision of the court of appeals affirming the district court's dismissal of both suits was plainly correct, and there is no occasion for further review. The decision represents a proper application of the settled principle that public officers are not subject to

suit for damages based upon acts done within the scope of their authority. *Barr* v. *Matteo*, 360 U.S. 564; *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F. 2d 655 (C.A. 2), certiorari denied, 374 U.S. 827; *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949; *Jones* v. *Kennedy*, 121 F. 2d 40 (C.A.D.C.), certiorari denied, 314 U.S. 665; *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A.D.C.), certiorari denied, 305 U.S. 643. In *Holmes* v. *Eddy*, as the court of appeals pointed out (Pet. App. 4a), the petitioners themselves alleged in their complaint that the acts of the government respondents upon which the suit rested were done "within the scope of their employment." In *Holmes* v. *United States*, the court below similarly noted (Pet. App. 7a-8a) that the record showed that the drawings involved "were shown only to Commission personnel and a restricted group of engineers * * * who by training were qualified to give an expert opinion with regard to the drawings for use in the [Commission] action"; that the Commission's investigation of the petitioners was made "in accordance with statutory authority"; and that all of the acts which that suit challenged were "done within the scope and course of carrying out official duties * * *." And, since all of these acts by the government respondents were within the scope of their official duties, there was plainly no basis upon which the performance of such acts could be enjoined.

There is no substance to petitioners' contention (Pet. 3, 6) that the decision below conflicts with *New York Times Co.* v. *Sullivan*, 376 U.S. 254. The hold-

ing in that case that a newspaper was immune from liability for defamatory statements made about public officials unless such statements were made with actual malice (376 U.S. at 278-283) is in accord with the principle that the court below applied here. Indeed, the court in the *Times* case specifically analogized the privilege for criticism of official conduct which it there recognized to "the protection accorded a public official when *he* is sued for libel by a private citizen," citing *Barr* v. *Matteo*, *supra* (376 U.S. at 282, italics in original).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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